UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

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| TELBERT BARNES, | ) | |
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| | ) | |
| v. | ) | Civ. No. 01-48-P-C |
| | ) | |
| IMMIGRATION AND NATURALIZATION SERVICE, | ) | |
| | ) | |

**RECOMMENDED DECISION ON 28 U.S.C. § 2241 MOTION**

Telbert Barnes has filed a habeas corpus petition pursuant to 28 U.S.C. § 2241. (Docket No. 2.) On March 5, 2001, the District Court issued an order staying, on an interim basis, the execution of the Immigration and Naturalization Service (INS) removal order of which Barnes seeks habeas review. (Docket No.5.) The INS has filed a motion to dissolve the stay and to dismiss the habeas petition. (Docket No. 6.) After a few more submissions from each side, including Petitioner's motion to extend time to respond, the District Court referred the matter to me on August 13, 2001. I recommend that Barnes's § 2241 motion be **DENIED** and that the interim stay be lifted.

***Relevant Background***

Barnes is a Jamaican national. He entered the United States in 1991 as a nonimmigrant temporary worker. He attained status as a lawful permanent resident on February 23, 1993, after marriage to a United States citizen.

Barnes was convicted in a Maine court on five counts of drug (cocaine) trafficking on December 12, 1997. He received a sentence of eight-years, with all but three-years suspended. Barnes challenged this conviction in the Maine Courts without

success. He also filed a habeas corpus petition pursuant to 28 U.S.C. § 2254 in the federal court raising four claims of ineffective assistance of counsel. Magistrate Judge Cohen recommended denial of this petition on November 30, 2000. Barnes v. Maine, 2000 WL 1763688 (D. Me. Nov. 30, 2000). Barnes objected to the recommended decision. The District Court affirmed. Barnes filed a notice of appeal to the First Circuit Court of Appeals and that body currently has the matter under advisement.

The INS commenced its removal proceedings vis-à-vis Barnes on May 4, 2000, with its issuance of a notice to appear. Pursuant to the Immigration and Nationality Act (INA) it charged that Barnes was removable from the United States because of his conviction for drug trafficking, a crime that constitutes an "aggravated felony" as defined by the INA. INA § 101(a)(43). Removal proceedings were held on August 4, 2000. The immigration judge found that Barnes was removable as charged and ordered removal from the United States to Jamaica. Barnes appealed to the Board of Immigration Appeal. The Board affirmed the immigration judge in a per curiam order dated December 27, 2000. Barnes attempted to take the matter to the First Circuit Court of Appeals. The First Circuit rejected Barnes's tender, concluding that it had no jurisdiction to directly review the removal order. (Pet. Resp. Docket No. 8, Ex. A.)

***Discussion***

A pair of recent Supreme Court cases answer what was before a debated question: This court can review Barnes's challenges to the removal proceeding under 28 U.S.C. § 2241. See Calcano-Martinez v. Immigration and Naturalization Serv., __ U.S. __, 121 S.Ct 2268 (2001); Immigration and Naturalization Serv. v. St. Cyr, __ U.S. __, 121 S.Ct. 2271, *2278--87 (2001); see also 8 U.S.C. § 1252(a)(2)(C). This court can grant Barnes

habeas relief pursuant to 28 U.S.C. § 2241 if he is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3).

***A. Due Process Violation Allegations***

It is beyond dispute that "once an alien enters the country," "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." Zadvydas v. Davis, __ U.S. __, 121 S.Ct. 2491, *2500 (2001). "As [a] person within our jurisdiction," Barnes is "entitled to the protection of the Due Process Clause. Liberty under the Due Process Clause includes protection against unlawful or arbitrary personal restraint or detention." Id. at *2514 (Kennedy, J., dissenting). Barnes's liberty rights "are subject to limitations and conditions not applicable to citizens, however." Id.

*1. Retroactivity Argument*

The United States Supreme Court in its St. Cyr opinion summarized how the April 24, 1996, Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the September 30, 1996, Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) have dramatically changed the legal landscape for immigrants, such as Barnes, who are convicted of controlled substance offenses by limiting the availability of discretionary relief from removal. 121 S. Ct. at 2275, 2277-78 (observing that a 1990 amendment to INA § 212(c) played an initial role in reducing the numbers of aliens eligible for discretionary relief). See also id. at 2275-77 (discussing pre-1990 development of immigration laws concerning aliens and immigrants with convictions).

Pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii) any alien is removable if he or she is "convicted of an aggravated felony anytime after admission" to the United States. For

purposes of this provision, Congress has defined "aggravated felony" to include "illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)." Id. at § 1101(a)(43)(B). See also Id. at § 1227(a)(2)(B)(i) (providing that any alien who after admission is convicted of a violation, or a conspiracy or attempt to violate, a controlled substance law, other than a single offense for possession of 30 grams or less of marijuana, is removable). As the law stands as of the IIRIRA effective date of April 1, 1997, the Attorney General only has discretion to cancel removal of an inadmissible or deportable alien if, the alien:

> (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
> (2) has resided in the United States continuously for 7 years after having been admitted in any status, and
> (3) has not been convicted of any aggravated felony.

8 U.S.C. § 1229b(a).

Barnes argues that it was impermissible to apply the changes in the immigration laws retroactively to him. He believes that he qualifies for a waiver from removal, apparently based on the fact that he is the father of a United States born child who is under the age of eighteen. Barnes explains that he became a permanent resident under the "old law" and was never given any notification of an adjustment to his status after the immigration and naturalization laws were altered in 1996 and 1997. He claims he is grandfathered under the old law and, thus, his aggravated felony ought not be an automatic trigger for removal.

In the removal hearing Barnes did not contest that he had been convicted of the trafficking offenses. (Admin. R. Right at 30.)[1] Though Barnes sought a suspension of

[1] The Administrative Record provided to the court consists of a manila file folder approximately two and one-half inches thick. The documents on the right hand side are Bates stamped R00001-R00210. The

deportation or the cancellation of removal, the immigration judge concluded that Barnes was not eligible for cancellation of removal under the law as it stood at the time that the removal proceedings were initiated against Barnes. (Id.) The judge observed that Barnes did not have sufficient years as a permanent resident prior to his trafficking offenses. (Id.) The judge also concluded that he was not eligible for other relief, such as voluntary departure, because of his controlled substance convictions. (Id.) Barnes brought to the court's attention the fact that he was desirous to stay in the United States to be a father to his child. (Id. at 31.) The judge remarked, "Unfortunately, the law does not allow me to grant any relief to this respondent. No relief shall be granted." (Id.)

Unlike the petitioners in St. Cyr, Barnes's conviction by guilty plea entered well after the April 1, 1997 effective date of the IIRIRA. The indictment charges Barnes with criminal conduct in September of 1997, it is signed October 31, 1997, (Admin. R. Right at 25-28), and the conviction entered December 12, 1997. Thus, there has been no retroactive application of the immigration laws to Barnes.[2]

*2. Notification of Right to Appeal the Denial of Motion for Cancellation of Removal*

Barnes asserts that the immigration judge who issued her removal order on August 4, 2000, did not notify Barnes of his right to appeal the dismissal of his motion for cancellation, (Pet. Answer, Docket No. 8, at 17), in contravention of the Due Process Clause. Barnes concedes that the INS judge did inform him of his right to appeal the removal order. (Id.)

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documents on the left hand side are identified L00001-L00209. There is no apparent order to the documents filed and discerning the relevant portions of the INS Administrative Record is a monumental task.

[2] The United States construes this portion of Barnes's pleading as a challenge to the INS notice to appear, making a record reference to a challenge made in Barnes's appeal to the immigration board. (Admin. R. Left at 59-62.) I do not read this as part of Barnes's § 2241 challenge and if I did I would agree with the United States that the record demonstrates that Barnes had sufficient notice that his conviction subjected him to removal proceedings.

As stated above, 8 U.S.C. § 1229b(a) makes it clear that there was no discretion on the part of the Attorney General to cancel Barnes's removal given Barnes's immigration and criminal history. Thus, as the United States observes, there can be no prejudice to Barnes as the result of the judge's alleged failure to apprise him of his right to appeal an order denying relief that the court was statutorily barred from conferring on Barnes. The fact that Barnes was apprised of his right to appeal the removal order and that the removal order, itself, was appealed also demonstrates an absence of prejudice.

3. *Motion to Reopen Case*

In his April 10, 2001, addendum to his petition Barnes further takes the INS to task for its treatment of a motion to reopen his case. He recounts how he submitted this motion to the United States Immigration Court. The court returned it to him with instruction that he file it with the Board of Immigration Appeals (BIA). Barnes did this. Now he finds error in the fact that, rather than a BIA judge or panel of judges deciding the merits of this motion, a local office director for the INS denied his "application for a stay of removal" by way of a letter. Barnes questions whether he was denied his administrative remedies because of the treatment of these filings.

The United States' response to this claim is of little assistance. It asserts that the motion to reopen "is not properly before the Court in these proceedings" without offering any legal basis for this conclusion. (Resp't Reply at 9.) To the extent that the United States based this conclusory assertion on the fact that the claim is proffered in an addendum, (See Addendum Docket No. 8), I conclude that allowing Barnes to supplement his § 2241 petition in early April only served judicial economy, fairness, and finality.

As to the merits of this due process claim, the United States argues that Barnes is confusing his motion to reopen with an application for stay of deportation. It asserts that it is "clear from the face of petitioner's exhibits that the district director had nothing to do with the letter from the immigration court." (Id. at 9.) The United States had offered no record citations to assist the court in confirming this conclusion. What Barnes offers is a form letter from the United States Immigration Court in Boston, Massachusetts, indicating that it is returning Barnes's "Motion to Reopen BIA Jurisdiction." It notes that Barnes paid no filing fee and directed Barnes to complete the fee waiver and send it with his motion to the Board of Immigration Appeals. It also instructs, "Mr. Barnes[,] everything needs to go to the BIA. Title it 'Motion to Reopen BIA Jurisdiction.'" (Pet'r Addendum, Ex A.) This memo is dated February 1, 2001. The letter Barnes received from the district director of the local office of the INS is dated March 29, 2001. It states that it is responding to Barnes's "application for stay of removal (Form I-246) filed without the requisite fee and valid passport on February 14, 2001." (Id. Ex. B.) It also notes that the motion for stay that it had before it was related to the motion Barnes had first filed with the immigration court, but which was under the jurisdiction of the BIA.

Because of the dates involved and the absence of a full record indicating what Barnes submitted to the BIA after receiving the memo from the immigration court, I cannot conclude that the March 29, 2001, letter from the local district director is not related to Barnes's motion to reopen. For all that I know Barnes submitted Form I-246 with his papers initially sent to the immigration court and it was this submission that made its way into the local office of the INS while the motion to reopen was shuffled to

and is now sitting with the BIA.[3] Barnes has not provided the court with the pleading he submitted so I cannot discern what relief he sought through the motion to reopen.

Putting the pleading shortfalls to one side, I cannot make out a cognizable claim on behalf of Barnes. I will assume that Barnes was asserting a claim under the Legal Immigration Family Equity Act (LIFE). Though LIFE is a rather new enactment that has had minimal exposure to the heat in the courts, I conclude that Barnes can gain no sustenance from it. The act provides limited relief for aliens in the country who have illegal immigrant status. Espinal v. Pere, 144 F.Supp.2d 53, 55 (D.P.R. 2001). However, even if the act's VISA oriented provisions could be read to apply to Barnes by analogy or equitably, Barnes could not be sheltered by the provisions of LIFE because he was under a prior order of removal and had a prior criminal conviction. Id. See 8 U.S.C. § 1255 (containing the LIFE amendments).

*4. Access to Consulate*

Barnes claims that his rights under the Vienna Convention[4] were violated because as a foreign national he was not given access to his Jamaican diplomatic or consular representatives. In his initial petition he complains that the Cumberland County Jail did not have adequate facilities to allow him to consult with a Jamaican official. And though, as a detainee, he had a much greater need for addresses and phone numbers than would a Jamaican national at large, no one at the Cumberland County Jail or from the INS so assisted him. In fact, he was 'misleadingly' given the name of a deceased consular when

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[3] If Bames was seeking to reopen the BIA's jurisdiction in order for his case to be reviewed under the Legal Immigration Family Equity Act (LIFE), as suggested by the district director's letter, the record shows no indication that that avenue for relief has been fully exhausted. However, since I am clearly not reviewing Barnes's pleadings under 8 U.S.C. § 1252, the limitation of subsection (d) would not seem to stay my hand. Therefore, whether or not the court requires exhaustion of Barnes's LIFE claim is within the court's discretion. See Hernandez v. Reno, 238 F.3d 50, 54-55 (1st Cir. 2001).

[4] Barnes also cites to the United Nations Standards as promising the same right of consultation. The brunt of his initial petition and his reply as to this ground involve the Vienna Convention.

he requested contact information. He alleges that he requested time to consult with his consulate on July 28, 2000, before the immigration judge, which request was denied. At that point he was also told that he would have to represent himself and, he alleges, was denied additional time to prepare his defense. This challenge by Barnes fails.

First, it is far from clear that Barnes has an individually enforceable right under the Vienna Convention. See Breard v. Greene, 523 U.S. 371, 375 (1998); United States v. Santos, 235 F.3d 1105, 1107-08 (8th Cir. 2000); United States v. Li, 206 F.3d 56, 60, 62 (1st Cir. 2000) (en banc).

Even assuming he has enforceable rights under the treaty, not one of Barnes's allegations suggests that the Cumberland County Jail or the INS circumvented the Convention. The provision of the Vienna Convention to which Barnes cites requires that Barnes be notified of his right to have his consulate notified of his detention, see id., and that consulate officials be given the opportunity to visit and correspond with Barnes, see id. The affirmative notification benefit seems to run to the consulate of the detainee's country; these provisions do not seem to require that the entity that is detaining the foreign national do more to actively facilitate post-notification contact between the consulate and the detainee. See Li, 206 F.3d at 66-68 (Seyla, J. and Boudin, J., concurring).

Barnes had early notice of his right to contact his consulate. Barnes attaches to his reply brief a copy of a notice of rights from the INS that is signed by Barnes on May 1, 2000. The phrase, "You have the right to communicate with the consular or diplomatic officers from your country," is underlined, perhaps by Barnes. (Pet'r Reply, Ex. B.) This notice continues to state that Barnes can place a telephone call to "a lawyer, or other

legal representative, or consular officer at any time prior to your departure from the United States." (Id.) And Barnes nowhere alleges that the jail or the INS failed to comply with a request by Barnes for notification of his consulate about his INS detention or the removal proceedings. Though Barnes does state that he was given the name of a deceased consular, the fact that he discovered that the consular is deceased indicates that he was able to contact someone at the consulate.

Barnes complains that he was not given sufficient time by the immigration judge to contact his consulate. The transcripts of his hearings disprove this contention. At the first hearing on removal on June 23, 2000, Barnes was granted more time to seek legal assistance. (Admin R. Left at 97-100.) Barnes was given a further extension for the purpose of getting legal assistance at the July 7, 2000, hearing. (Id. at 105.) At the July 28, 2000, hearing the judge continued the hearing for the final time until August 4, 2000. (Id. at 116-17.) Contrary to Barnes's assertion, Barnes did not raise a concern about contacting Jamaican diplomats at the first three hearings. Thus, in a sense, Barnes has procedurally defaulted this claim. See Mendes v. INS, 197 F.3d 6, 12 (1st Cir. 1999). Exhaustion and procedural default concerns aside, see note 3, the failure of the INS judge to grant Barnes further time does not appear unreasonable, particularly since there is no suggestion that the consulate could have done anything to change Barnes's status under the United States' immigration law. See Sango-Dema v. Dist. Dir., I.N.S., 122 F.Supp.2d 213, 222 (D. Mass. 2000). Cf. Santos, 235 F.3d at 1108-09 (concluding that, assuming that the Vienna Convention creates an individually enforceable right, the petitioner received proper notification four days after arrest and five months before trial, and at most the Vienna violation should have resulted in the pre-notification confessions

suppression, the admission of which was harmless error); United States v. Ademaj, 170 F.3d 58, 66-68 (1st Cir. 1999) (identifying no plain error in the alleged failure of notification, observing that the defendant did not indicate how the notification of his consul would have helped with his defense).[5] For these reasons I conclude that Barnes's Vienna Convention contention is of no merit.

*5. Denial of Federal Benefits*

Barnes asserts that he was denied federal benefits that he was entitled to under 21 U.S.C. § 862(c)(2) by dint of an INS detainer notice. While imprisoned in a Maine Correctional Institution Barnes was placed in a chemical treatment program. The INS detainer notice prevented Barnes from participating in the "most successful phase of treatment," because the detainer notice stated that Barnes could not participate in the work release or pre-release portion of the program.

First, Barnes is no longer "in custody" at the Maine Correctional Institution for his drug trafficking convictions. Thus, for the purposes of this attack on the terms of that sentence, Barnes's habeas challenge is noncognizable. Maleng v. Cook, 490 U.S. 488, 490-91 (1989) ("We have interpreted the statutory language [of 28 U.S.C. § 2241(c)(3)] as requiring that the habeas petitioner be 'in custody' under the conviction or sentence under attack at time his petition is filed."); see also Spencer v. Kemna, 523 U.S. 1, 7-12 (1998) (requiring continuing collateral consequences from the conviction in order to maintain a habeas challenge). Second, Barnes's reliance on 21 U.S.C. § 862(c)(2) is misplaced. Barnes's own description of the reasons why he was barred from the final stage of the program demonstrate that the Maine correctional officials were not denying

[5] The need to contact a consulate with respect to a statutorily mandated removal is certainly of lesser consequence than the need to confer with a consulate or diplomatic official in the hopes of winning intervention on behalf of a criminal defendant.

Barnes federal benefits under 21 U.S.C. § 862(a)(1). Subsection (a)(1) gives a court discretion to determine that an individual convicted of drug trafficking is ineligible for federal benefits for a set stretch of time. 21 U.S.C. § 862(a)(1). Subsection (2) provides that "benefits which are denied under this subsection shall not include benefits relating to long-term drug treatment programs" provided the convict meets certain criteria. Id. at § 862(a)(1) (emphasis added). Finally, whatever is made of the chemistry between the drug treatment program Barnes participated in while at the Maine Correctional Institute, 21 U.S.C. § 862(c)(2), and the INS detainor notice, under United States Supreme Court and First Circuit precedent, the work-release portion of the program would not amount to a "liberty interest" within the embrace of the Due Process Clause. See Sandin v. Conner, 515 U.S. 472 (1995); Dominique v. Weld, 73 F.3d 1156 (1st Cir. 1996).

***B. Prison Condition Allegations***

*1. Inadequate Medical Treatment*

Barnes also alleges that his Eighth and Fourteenth Amendment rights were violated because he received inadequate medical treatment while he was an INS detainee housed at the Cumberland County Jail in Maine. He states that there was a ninety-day lag between his notification to the authorities that he needed dental attention and when he was administered care. He had difficulties eating, drinking, and sleeping. Though there was no permanent injury his chronic aliment was substantial. This lack of care amounted to cruel and unusual punishment and was tantamount to an additional punishment to that imposed by the court.[6] The United States argues that Barnes's claim must fail because

[6] On May 2, 2001, Barnes filed a motion to amend to add allegations concerning the Cumberland County Jail's failure to provide him with adequate medical treatment of an eye condition. This motion referenced this petition and a second habeas petition that challenged Barnes's state court convictions. In a May 7, 2001, order I denied this motion, observing that this petition was not the appropriate vehicle to

his own efforts to challenge his removal have resulted in his continued detention and because his claim is moot since he has now received care for his dental problem.

This claim is, in essence, a complaint about the conditions of Barnes's confinement and is not subject to habeas relief. See Koch v. Schuylkill County Prison, 94 F.Supp.2d 557, 564-65 (M.D. Pa. 2000) (concluding that a habeas motion seeking an injunction against a prison due to inadequate medical treatment should be recharacterized as a 42 U.S.C. § 1983 complaint, after notice to the petitioner), Kamara v. Farquharson, 2 F.Supp.2d 81, 88-89 (D. Mass. 1998) (habeas can be utilized to challenge the "fact, duration or degree" of confinement but not a condition of confinement, such as inadequate medical care); see also Price v. Bamberg, 845 F. Supp. 825, 827 (M.D. Ala. 1993).

*2. Denial of Postage for Foreign Correspondence*

In another ground that relates to his treatment by the Cumberland County Jail, Barnes alleges that he was not assisted by the jail to communicate with his family abroad because the authorities only provide pre-stamped envelopes with domestic postage. Cumberland County Jail flatly refused to provide him with an envelope with adequate foreign postage and an INS employee who Barnes enlisted to assist him attempted unsuccessfully to intervene. He doesn't know if his family is alive or where they are living. This indifference to his postal needs, Barnes asserts, interfered with his fundamental right to maintain family relationship.[7]

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challenge inadequate medical treatment and that Barnes's other habeas was on appeal to the First Circuit Court of Appeals and, thus, this court lacked authority to authorize any amendment thereto.

[7] Barnes also argues that this conduct falls within the proscription of the criminal statute 18 U.S.C. § 242. This federal criminal statute does not provide Barnes with a private right of enforcement or cause of action.

In response, the United States states that this inadequate postage complaint does not go to Barnes's continued detention of which he complains. Rather it is a complaint about a violation of his rights while in detention. I agree, and for the reasons articulated in the forgoing section, I conclude that if there is any constitutional claim here, it is one that is properly brought pursuant to 42 U.S.C. § 1983. It has no place in this habeas petition.

***C. The Stay of Removal***

Because of the forgoing I conclude that Barnes cannot meet the standards of 8 U.S.C. § 1252(f)(2) and INA § 242(f)(2). I recommend that the temporary stay be lifted.

***Conclusion***

After thorough consideration of the submissions of the parties, for the reasons stated above, I recommend that Barnes's 28 U.S.C. § 2241 petition be **DENIED** and that the temporary stay of the removal order be lifted.

NOTICE

> A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.
>
> Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

_____

Margaret J. Kravchuk
U.S. Magistrate Judge

Dated August 30, 2001

ADMIN

U.S. District Court

District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 01-CV-48

BARNES v. IMMIGRATION & NATURA Filed: 02/07/01

Assigned to: JUDGE GENE CARTER

Demand: $0,000 Nature of Suit: 460

Lead Docket: None Jurisdiction: US Defendant

Dkt # in USDC, Portland, ME : is 00cv218pc

Cause: 28:2241 Petition for Writ of Habeas Corpus (Federal)

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plaintiff

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